

Before the
Administrative Hearing Commission
State of Missouri



MISSOURI BOARD FOR ARCHITECTS,)
PROFESSIONAL ENGINEERS,)
PROFESSIONAL LAND SURVEYORS,)
AND LANDSCAPE ARCHITECTS)
)
Petitioner,)
)
v.)
)
DONALD DUSTIN CURTIS,)
)
Respondent.)

No. 12-1565 AR

DECISION

Respondent Donald Dustin Curtis' Missouri architect license is subject to discipline because disciplinary action was taken against him in another state, upon grounds for which revocation or suspension of his license is likewise authorized in Missouri. Mr. Curtis' license is also subject to discipline because he made a misrepresentation in renewing it.

Procedure

Petitioner Missouri Board for Architects, Professional Engineers, Professional Land Surveyors, and Landscape Architects filed a complaint with this Commission on August 22, 2012, seeking a determination that cause exists to discipline Mr. Curtis' architect license. Mr. Curtis filed an answer on September 25, 2012.

We held a hearing on April 18, 2013. Mr. Curtis appeared in person and was represented by his attorney, David Barrett. The Missouri Board was represented by its counsel, Edwin Frownfelter.

The case became ready for decision on August 5, 2013, when the parties completed their written briefing.

Findings of Fact

1. Donald Dustin Curtis is licensed as an architect in Nevada and in Missouri, and was so at all times relevant to these proceedings.

Matters before the Nevada Board

2. Mr. Curtis, individually and on behalf of two corporations, Curtis Architecture, Inc. and OneArchitecture, PLC, entered into a written settlement with the Nevada State Board of Architecture, Interior Design and Residential Design (the Nevada Board), in October 2012.

3. Under the terms of the settlement, Mr. Curtis acknowledged that the Nevada Board had received information constituting sufficient grounds for an administrative complaint to be filed against him.^{1,2}

4. The settlement resolved Mr. Curtis' alleged violations of Nev. Rev. Stat. § 623.270.1(f), Nev. Admin. Code § 623.740(1), Nev. Admin. Code § 623.810, Rule of Conduct 3.2, and Rule of Conduct 5.5, when he:

- offered architectural services for Nevada, using firm names of Curtis Architecture, Inc. and One Architecture which were not approved by the Nevada Board[;...]
- inappropriately displayed photographs of Nevada projects on his One Architecture website when neither he nor his Las Vegas

¹ For purposes of addressing the content of the Nevada settlement, references to Mr. Curtis should be understood to refer also to his two corporations.

² Petitioner's Exhibit 3, p. 1.

affiliates were the architect of record for the projects and no credit was given to the architect or design professional of record[; and]...

- unintentionally made misleading statements or claims on his One Architecture website...listing [the specialties of his Las Vegas affiliates and posting photographs of certain buildings], which may have led the public to believe One Architecture and its affiliates were qualified and licensed to provide the architectural services rendered in the [posted] photographs^{3]}

4. Mr. Curtis acknowledged that the Nevada Board had “the legal power and authority to take disciplinary action up to and including revocation of his Certificate of Registration upon proof of the allegation in the complaint pending against him.”⁴

5. Mr. Curtis further acknowledged “that failure to comply with any of the terms of this agreement constitutes independent grounds for disciplinary action.”⁵

6. Mr. Curtis agreed to pay an “administrative penalty” of \$1,500 and costs in the amount of \$1,000.⁶

7. Mr. Curtis agreed that he understood the statutes and rules he “allegedly...violated and agree[d] to assure discontinuance of illegal acts including...violating any law, regulation or code of ethics pertaining to the practice of architecture, interior design and residential design, using an unapproved firm name and [making] misleading, deceptive, [or] false statements or claims.”⁷

8. The agreement included a non-admission of guilt provision, under which Mr. Curtis “neither admit[ted] nor denie[d] that his conduct constitutes a violation of law regulating the practice of architecture, interior design and residential design” and further provided that he had “elected to enter into [the] settlement agreement rather than face the

³ Petitioner’s Exhibit 3, p. 1.

⁴ *Id.*

⁵ *Id.*, p. 2.

⁶ *Id.*

⁷ *Id.*

possibility of a Formal Disciplinary Hearing before the [Nevada Board].”⁸

9. Mr. Curtis was “fully aware of his rights to contest the charges pending against him[,]” and “voluntarily waived” those rights “in exchange for the Board’s acceptance of [the] settlement agreement.”⁹

10. Mr. Curtis agreed to indemnify and release the Nevada Board from liability for all claims arising out of “this investigation, this disciplinary action, this settlement or its administration.”¹⁰

11. For the settlement to become effective, Mr. Curtis had to sign the written agreement and pay the monies he agreed to pay, and the Nevada Board had to accept the settlement. The written agreement stated that the matter would be presented to the Board at its meeting of October 18, 2011; that the Board was free to accept or reject the settlement; and that if the Board rejected it, those same Board members might be the ones who ultimately heard the disciplinary complaint against Mr. Curtis.¹¹ Mr. Curtis waived his statutory right to notice of hearing.¹²

12. Mr. Curtis signed the written agreement on October 10, 2011 and paid the administrative penalty and costs.

13. The Nevada Board accepted the settlement by Board Order issued October 18, 2011.

14. Laura Bach, an investigator with the Nevada Board’s Enforcement Division, sent Mr. Curtis a letter dated October 21, 2011, stating that the settlement had been accepted on

⁸ Petitioner’s Exhibit 3, p. 2.

⁹ *Id.*

¹⁰ *Id.*, p. 3. The same quoted language appears both under the heading “Release from Liability” and the heading “Indemnification.”

¹¹ *Id.*

¹² *Id.*

October 18, 2011, and enclosing a copy of the final Settlement Agreement and Order. She added, “[P]lease make sure you are aware that this Board does consider this settlement agreement to constitute disciplinary action. This case is now closed.”¹³

15. According to Betty Ruark, another investigator for the Nevada Board, that board always considered its settlements to be disciplinary actions.

16. The Nevada Board later entered information regarding its settlement with Mr. Curtis into the disciplinary database of the National Council of Architectural Registration Boards (NCARB). This is a national database used by state architectural boards to review and determine whether their licensees have been disciplined in other states.

Matters Before the Missouri Board

17. Mr. Curtis’ Missouri architect license was due for renewal between October and December 2011, for the 2012-2013 period.

18. On December 12, 2011, Mr. Curtis used the online process made available by the Missouri Board for Architects, Professional Engineers, Professional Land Surveyors, and Landscape Architects (the Missouri Board) to renew his license.

19. As part of the online renewal process for the 2012-2013 period, licensees were required to read and indicate their agreement with a series of statements, including:

Beginning January 1, 2010 to present . . . I have not been the subject of disciplinary action in any other licensing jurisdiction.^[14]

Mr. Curtis selected the box indicating he agreed with that statement, that is, he agreed that he had not been the subject of disciplinary action in any other licensing jurisdiction since January 1, 2010.

¹³ Petitioner’s Exhibit 4.

¹⁴ Petitioner’s Exhibit 12.

20. Upon performing a check of the NCARB disciplinary database, the Missouri Board discovered that Mr. Curtis had entered into a settlement with the Nevada Board and agreed to pay a civil penalty.

Conclusions of Law

Mr. Curtis' Missouri architect license is subject to discipline under § 327.441.2(8) and (3), RSMo.¹⁵

We have jurisdiction. §§ 327.441 and 621.045, RSMo. We decide the issues anew, stepping into the place of the Missouri Board, exercising any discretion it has, and remaking its decision. *State Bd. of Regis. for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 265-266 (Mo. App. W.D. 2012). We judge witness credibility and may believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992).

The Missouri Board bears the burden of proving, by a preponderance of the evidence, that cause exists to discipline Mr. Curtis's license. *See State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *Id.*

Here, the Missouri Board alleges cause exists under two subparts of § 327.441.2:

The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any license or certificate of authority required by this chapter or any person who has failed to renew or has surrendered such person's license or certificate of authority, for any one or any combination of the following causes:

* * *

(3) Use of fraud, deception, misrepresentation or bribery in securing any license or certificate of authority issued pursuant to

¹⁵ References to "RSMo" are to the Revised Statutes of Missouri (Supp. 2012), unless otherwise noted.

this chapter or in obtaining permission to take any examination given or required pursuant to this chapter;

* * *

(8) Disciplinary action against the holder of a license or certificate of authority, or other right to practice any profession regulated by this chapter granted by another state, territory, federal agency or country upon grounds for which revocation or suspension is authorized in this state. . . . [Emphasis added.]

We address subpart (8) first.

I. Section 327.441.2(8), RSMo – Disciplinary action by another state, on grounds that suffice in this state

The action taken by the Nevada Board was a disciplinary action, as a matter of law, and the grounds therefor would suffice as grounds for revocation or suspension in Missouri.

A. Disciplinary Action

The phrase “disciplinary action” as used in § 327.441.2(8) is not statutorily defined. But the same phrase appears in analogous physician and dentist disciplinary statutes and has been examined by the Missouri Court of Appeals in two cases we find instructive, *Bhuket v. State ex rel. Mo. Bd. of Regis’n for the Healing Arts*, 787 S.W.2d 882 (Mo. App. W.D. 1990), and *Holdredge v. Mo. Dental Board*, 261 S.W.3d 690 (Mo. App. W.D. 2008).

In *Bhuket*, the Missouri Board of Registration for the Healing Arts sought to discipline a physician under § 334.100.2(8), RSMo (Supp. 1984), because, the board alleged, he had been subject to “disciplinary action” by the Texas State Board of Medical Examiners, and the same bases for the Texas discipline constituted bases for discipline in Missouri. 787 S.W.2d at 883. In the Texas case, the Texas Board filed a complaint against the physician and heard evidence on the complaint, but the parties settled before the case was submitted. *Id.*

The Court of Appeals described Missouri’s statutory disciplinary scheme as a remedial one, intended to protect the public health and welfare, and to “be construed with a view to

suppression of wrongs and mischiefs undertaken to be remedied.” 787 S.W.2d at 885. The court also explained that the phrase “disciplinary action” was not technical, and so the words should be understood in their “plain, ordinary and usual sense.” *Id.* (citation omitted). The court specifically rejected defining the phrase by resort to a legal dictionary. *Id.* Instead, the court explained, the phrase “contemplates any censure, reprimand, suspension, denial, revocation, restriction or other limitation placed upon the license of a person subject to” the disciplinary provisions of law, and need not include a formal legal proceeding. *Id.*

The court concluded that the Texas proceedings resulting in the agreed restrictions placed on the physician’s license, including suspension and a limitation on the type of work the physician could perform if reinstated, constituted a disciplinary action for purposes of Missouri law, § 334.100.2(8). *Id.*

Holdredge is similar to *Bhuket*. In *Holdredge*, the Missouri Dental Board sought to discipline a dentist under § 332.321.2(8), RSMo (Supp. 2002), because, the board alleged, he had been subject to “disciplinary action” by the Wisconsin Dentistry Examining Board, and the same bases for the Wisconsin discipline constituted bases for discipline in Missouri. 261 S.W.3d at 694. In the Wisconsin case, the Wisconsin Board instituted an investigation and commenced disciplinary proceedings, then entered into a stipulation with the dentist, and entered an agreed final decision and order. *Id.* at 692. The dentist neither admitted nor denied the allegations. *Id.* He agreed, and the Wisconsin Board ordered him, not to sexually harass any patient, employee, or co-worker; to notify the Wisconsin Board if he violated the agreement; and to pay the costs of the proceeding. *Id.*

Quoting *Bhuket*, the court in *Holdredge* explained that the term “disciplinary action” should be “construed with a view toward suppressing the wrongs undertaken to be remedied.”

261 S.W.3d at 694 (*Bhuket*, 787 S.W.2d at 885). The court considered the Wisconsin order a reprimand or censure, and the proceedings to have been in the nature of a disciplinary action for purposes of applying § 332.321.2(8). *Id.* at 694.

As noted, no appellate decision construes the phrase “disciplinary action” in the context of the architect disciplinary statute at issue here, § 327.441.2(8). But like the regulation of physicians and dentists, the purpose of the state’s regulation of the profession of architecture is protection of the public. *Bird v. Mo. Bd. of Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects*, 259 S.W.3d 516, 523 (Mo. banc 2008) (citing *Duncan v. Mo. Bd. for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 535-536 (Mo. App. W.D. 1988)). The remedial nature of § 327.441.2(8) leads us to conclude that “disciplinary action” should be construed broadly and in a non-technical fashion, with a view toward suppressing the wrongs to be remedied, as in *Bhuket* and *Holdredge*.

We conclude Mr. Curtis was the subject of a disciplinary action, as a matter of law, in Nevada. The settlement constitutes a censure or reprimand, in view of the parties’ acknowledgement of sufficient grounds for the filing of a complaint; resolution of the five alleged violations of law, regulation and rules of conduct; and Mr. Curtis’ payment of the administrative penalty and costs. The settlement also constitutes a restriction or other limitation placed upon Mr. Curtis’ license, because he agreed to discontinue performing the acts that allegedly violated the law, regulations, and rules of conduct.

We reject Mr. Curtis’ argument that we need also consider whether the Nevada disciplinary action was “serious.”¹⁶ He bases his argument on analysis drawn from a Massachusetts case, *Anusavice v. Bd. of Regis. in Dentistry*, 889 N.E.2d 953 (Mass. 2008), an

¹⁶ Respondent’s Post-Hearing Brief, pp. 4-6.

analysis not adopted by a Missouri court. We are accordingly bound to follow *Bhuket* and *Holdredge*, neither of which adds consideration of seriousness to the test of whether disciplinary action occurred in another state. Seriousness *is* likely to be relevant in a later proceeding, that is, the Missouri Board's determination of what level of discipline to impose, but it is not a factor in the instant proceeding.

Mr. Curtis was the subject of a disciplinary action in Nevada, for purposes of § 327.441.2(8).

B. Corresponding grounds for revocation or suspension in Missouri

The second part of § 327.441.2(8) requires the other jurisdiction's disciplinary action to have been taken upon grounds for which revocation or suspension is authorized in Missouri. We conclude it was.

The purpose of permitting a Missouri licensing agency to rely on discipline taken by another state is a practical one: if the same grounds authorize discipline in Missouri, it makes little sense to require the agency to re-prove those grounds. *See Holmes v. Missouri Dental Bd.*, 703 S.W.2d 11, 12 (Mo. App. W.D. 1985). In *Holmes*, the appellate court examined § 332.321.2(8), RSMo (Supp. 1984), a statute that permitted the Missouri Dental Board to discipline a dentist's license when another state had disciplined the licensee, "upon grounds for which revocation or suspension is authorized in" Missouri. *Id.* at 11. In comparing grounds, the court did not require that the words and phrases used in the states' respective disciplinary statutes be identical to trigger application of § 332.321.2(8). Rather, it required that the words and phrases "mean substantially the same" thing and that they be "directed at" the same "range of misbehavior[.]" *Id.* at 12.

The statute at issue in *Holmes* is essentially identical to the one at issue here,

§ 327.441.2(8). We therefore apply the *Holmes* test for comparison of the Nevada grounds with Missouri's. And we agree with the Missouri Board that, because it need not re-prove the conduct that forms the basis for discipline in Missouri, it simply need prove that the Nevada and Missouri grounds are substantially the same and directed at the same range of misbehavior. Application of the Missouri law to the underlying facts that formed the basis for the Nevada discipline is not necessary.

Accordingly, we next compare the Nevada grounds—Nev. Rev. Stat. § 623.270.1(f), Nev. Admin. Code § 623.740(1), Nev. Admin. Code § 623.810, Rule of Conduct 3.2, and Rule of Conduct 5.5—to the Missouri grounds cited by the Missouri Board.

1. Nev. Rev. Stat. § 623.270.1(f) – Violation of other laws

Nevada has an umbrella statute for discipline of architects, Nev. Rev. Stat. § 623.270.1(f), which provides grounds based on violation of any law, regulation, or code of ethics relating to the practice of architecture:

1. The [Nevada] Board may place the holder of any certificate of registration issued pursuant to the provisions of this chapter on probation, publicly reprimand the holder of the certificate, impose a fine of not more than \$10,000 against him or her, suspend or revoke his or her license . . . for any of the following acts:

* * *

(f) The holder of the certificate has violated any law, regulation, or code of ethics pertaining to:

(1) The practice of architecture or residential design[.]

The Nevada statute is substantially the same as Missouri's umbrella statute, § 327.441.2(6) RSMo, which provides grounds for discipline based on violation of any law, regulation or rule relating to the practice of architecture:

2. The [Missouri] board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any license or certificate of authority required by this chapter or any person who has failed to renew or has surrendered such person's license or certificate of authority, for any one or any combination of the following causes:

(6) Violation of, or assisting or enabling any person to violate, any provision of [Chapter 327, regulating architects and other professions], or of any lawful rule or regulation adopted pursuant to this chapter[.]

Therefore, Missouri may base discipline under § 327.441.2(6) on discipline imposed under Nev. Rev. Stat. § 623.270.1(f). Of course, the nature of the statutes requires us next to examine whether provisions of law, regulation or rule were violated.

2. Nev. Admin. Code § 623.740(1) – Use of corporate structure and names

The Nevada Board based its discipline on Mr. Curtis' violation of Nev. Admin. Code § 623.740.1, which provides:

Every corporate or fictitious name proposed for use by a registrant's firm, partnership, association or corporation must be submitted to the Board for review and approval before it is adopted and used by the firm, partnership, association or corporation.

Section 327.401.2, RSMo, provides:

Any domestic corporation formed under the corporation law of this state, or any foreign corporation, now or hereafter organized and having as one of its purposes the practicing of architecture...shall obtain a certificate of authority for each profession named in the articles of incorporation or articles of organization from the board....

Both provisions mean substantially the same thing. They require transparent use of corporate structure and names. The Nevada Board must review and approve any corporate name prior to its adoption and use by a corporation, and the Missouri Board must issue a certificate of authority to each profession named in the articles of incorporation of a corporation. Both are

directed at preventing the same potential mischief: shielding a responsible entity from discovery by the licensing agency or the public.

Cause for discipline therefore exists under § 327.441.2(6), RSMo.

3. Nev. Admin. Code § 623.810 - Display of architect's own work

The Nevada Board also based its discipline on Mr. Curtis' violation of Nev. Admin. Code § 623.810:

A registrant shall not display, present, exhibit or otherwise show any drawings, models, renderings, photographs or other work in a manner calculated to suggest that the work was performed by the registrant or his or her firm unless:

1. The registrant performed or had responsible control of the performance of the work; and
2. The architect, residential designer or registered interior designer of record is identified in the drawing, model, rendering, photograph or other work.

Section 327.441.2(14), RSMo, provides:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any license or certificate of authority required by this chapter or any person who has failed to renew or has surrendered such person's license or certificate of authority, for any one or any combination of the following causes:

(14) Use of any advertisement or solicitation which is false, misleading or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed.

The Nevada regulation and Missouri statute mean substantially the same thing, and are directed at the same range of misbehavior. The Nevada regulation requires an architect who displays drawings, models, renderings, and photographs to be candid about whose work it is—he

may not display it as his, or suggest it is his, unless it is his. The Missouri statute similarly provides for discipline in the case of an architect who uses any advertisement or solicitation that is false, misleading, or deceptive to the general public or the persons to whom it is primarily directed. The Nevada regulation does not limit displays to advertisements or solicitations, like the Missouri statute. But a display of drawings, models, renderings and photographs can be in the nature of advertising or solicitation of business, and advertisements and solicitations may contain drawings, models, renderings and photographs. Under either provision, an architect cannot take credit for work as his own, if it is not.

The parties disagree about whether the Nevada regulation and Missouri statute are similar in terms of scienter. Both parties argue that the Nevada regulation contains no scienter requirement. The Missouri Board argues the Missouri statute contains no scienter requirement, and so is similar to the Nevada regulation. Mr. Curtis argues the Missouri statute does contain it, and so is dissimilar. We conclude both do.

The Nevada regulation is not one of strict liability. It prohibits a “display...[made] in a manner calculated to suggest that the work was performed by the” architect, when the work was not performed by the architect. “Calculated” means “planned or contrived so as to accomplish a purpose or achieve an effect[.]” WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 315 (1986), in the case of Nev. Admin. Code § 623.810, the effect of suggesting work was performed by an architect other than the one who performed it.

Similarly, the Missouri statute prohibits the use of “false, misleading or deceptive” advertising or solicitation. “False” means “not corresponding to the truth or reality, ...erroneous, incorrect [.]... intentionally untrue, [or] lying[.]” *Id.* at 819. “Misleading” means “tending to

mislead : deceiving.” WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED at 1444. And “deceptive” means “tending to deceive : having power to mislead.” *Id.* at 585.

The concept of “calculated” in the Nevada regulation is similar to the concepts of “false, misleading or deceptive” found in the Missouri statute. Both provisions therefore require scienter, and are directed at the same range of behavior.

Cause for discipline therefore exists under § 327.441.2(14).

4. Rule of Conduct 3.2

The Nevada Board also based its discipline on Mr. Curtis’ violation of Rule of Conduct Rule 3.2:

An architect shall accurately represent to a prospective or existing client or employer his/her qualifications, capabilities, experience, and the scope of his/her responsibility in connection with work for which he/she is claiming credit.

The rule is in the nature of a truthful advertising provision. It requires an architect to be honest with prospective clients and employers—an architect cannot inaccurately represent his qualifications, capabilities, experience, or scope of responsibility regarding work for which he claims credit.

We agree with the Missouri Board that Rule of Conduct 3.2 is substantially similar to the truthful advertising provision of § 327.441.2(14) discussed above and directed at the same range of behavior. Under that Missouri law, an architect must be honest in his advertisement to and solicitation of the general public, or the persons to whom the advertisements and solicitations are directed.

Mr. Curtis does not dispute the similarity of Rule of Conduct 3.2 to the Missouri statute. He argues instead that there is no evidence in the record of Nevada’s or Missouri’s adoption of the set of rules of which it is a part, that is, the set of rules of conduct published by NCARB for

its member boards having rule-making authority to promulgate, if they choose.¹⁷ Therefore, he argues, his violation of a rule contained in the NCARB recommendations cannot form the basis for disciplinary action in Missouri. We disagree. First, pursuant to Nev. Admin. Code § 623.900.1(a), Nevada has in fact adopted the National Council of Architectural Registration Board's rules of conduct, by reference.

In any event, regardless of the manner in which a state chooses to apply such a national organization's code of conduct, the terms of the written settlement agreement between the Nevada Board and Mr. Curtis reflect that Mr. Curtis allegedly violated the two provisions of the NCARB Code. The parties agreed that those alleged violations, together with the other three listed, were the basis of the "controversy and subject matter of [the] dispute [their] settlement agreement [was] intended to resolve[.]"¹⁸ In short, Mr. Curtis' violation of Rule of Conduct 3.2 was in fact grounds for his discipline in Nevada, regardless of the manner in which Nevada applies the NCARB Code.

And even if Missouri has not somehow adopted the NCARB Code, it need not have for purposes of applying § 327.441.2. The question under § 327.441.2 is simply whether the other jurisdiction's disciplinary action was taken upon grounds for which revocation or suspension is authorized in Missouri. As we have already explained, Rule of Conduct 3.2 is substantially the same as § 327.441.2, and the provisions are directed at the same range of behavior.

Based on Mr. Curtis' Nevada discipline under Rule of Conduct Rule 3.2, we find cause for discipline exists under § 327.441.2(14).

¹⁷ Petitioner's Exhibit 8, p. 2.

¹⁸ Petitioner's Exhibit 3, p. 1.

5. Nev. Rule of Conduct 5.5

Under Nev. Rule of Conduct 5.5, “an architect shall not make misleading, deceptive, or false statements or claims.”

Section 327.441.2(5), RSMo, states:

2. The [Missouri] board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any license or certificate of authority required by this chapter or any person who has failed to renew or has surrendered such person’s license or certificate of authority, for any one or any combination of the following causes:

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter[.]

We conclude that grounds of making “misleading, deceptive or false statements or claims” (the Nevada rule) are substantially similar to grounds of “incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty” in the practice of the profession (the Missouri statute), and that the two provisions are directed at the same range of behavior.¹⁹

Based on Mr. Curtis’ Nevada discipline under Rule of Conduct Rule 5.5, we find cause for discipline exists under § 327.441.2(5).

II. Section 327.441.2(3), RSMo—Fraud, Deception, Misrepresentation, or Bribery

Cause exists to discipline Mr. Curtis’ license based on his misrepresentation in his renewal application.

The Missouri Board alleged in its complaint that cause for discipline exists under § 327.441.2(3) because Mr. Curtis did not disclose the Nevada discipline during his license

¹⁹ Mr. Curtis’ argument concerning Nevada’s and Missouri’s failure to adopt the NCARB Code, addressed in the preceding subsection in the context of Rule 3.2 and which we rejected, applied equally to Rule of Conduct 5.5.

renewal. Mr. Curtis argues he is not subject to discipline under § 327.441.2(3) because he did not believe the Nevada settlement constituted a disciplinary action.

As a preliminary matter, we note that § 327.441.2(3) identifies four separate acts constituting grounds for discipline: fraud, deception, misrepresentation or bribery. The Missouri Board referred to all four in its complaint by quoting the statute.²⁰ The Board then pointed in the complaint to the license renewal process, and Mr. Curtis' selection of the box indicating he agreed with the statement that he had not been "the subject of disciplinary action" in any other licensing jurisdiction since January 1, 2010.²¹ The Board alleged that the statement was "not true," due to the Nevada disciplinary action.²² In its Proposed Findings of Fact, Conclusions of Law, and Suggestions, pp. 25-26, the Board argues that Mr. Curtis' statement was "false,...and an act of dishonesty or misrepresentation" for purposes of the § 327.441.2(3) analysis. Based on the complaint and its post-hearing argument, we construe the Board's claim in regard to § 327.441.2(3) to be based on the misrepresentation ground, only.²³

Therefore, we turn to the definition of misrepresentation:

an untrue, incorrect, or misleading representation...;...a representation by words or other means that under the existing circumstances amounts to an assertion not in accordance with the facts < his duty to further the interest of his client does not require him to employ any trickery, chicane, deceit, or [misrepresentation.] >

WEBSTER'S THIRD NEW INT'L DICTIONARY at 1445. "Misrepresent," the verb form of misrepresentation, is further described as "[usually implying] intent, suggesting deliberate

²⁰ Complaint, p. 4, ¶ 17.

²¹ *Id.*, p. 4, ¶¶ 14-16.

²² *Id.*, p. 4, ¶ 16.

²³ The Missouri Board also alleged cause for discipline exists under § 327.441.2(5). Complaint, p. 5, ¶ 18. But the Board did not address the allegation in its post-hearing briefing, and we deem that ground waived.

falsification, injustice, bias, or prejudice[.]” WEBSTER’S THIRD NEW INT’L DICTIONARY at 1445.

We accordingly reject the Board’s argument that the status of the Nevada matter as a “disciplinary action,” as a matter of law, by itself means that Mr. Curtis’ statement during the renewal process equates with misrepresentation under § 327.441.2(3). Unlike § 327.441.2(8), examined above, § 327.441.2(3) requires scienter in describing the prohibited conduct as “misrepresentation,” even if misrepresentation is arguably the least serious of the prohibited acts listed.

The Board also argues that we may conclude Mr. Curtis intentionally made a false statement, based on the totality of the evidence. We agree. “Intent...is generally not susceptible of direct proof and may be established by circumstantial evidence or inferred from surrounding facts.” *State v. Moon*, 602 S.W.2d 828, 831 (Mo. App. W.D. 1980). The totality of the evidence shows Mr. Curtis deliberately made a representation in his renewal application that he knew was not true.

Specifically, Mr. Curtis negotiated his agreement with the Nevada Board himself, signed it on October 10, 2011, and so knew what it contained: explicit references to the matter as “discipline” or “disciplinary.”²⁴ It also recited that he elected to settle “rather than face the possibility of a Formal Disciplinary hearing before the” Nevada Board,²⁵ not that he was “avoiding the possibility of discipline” altogether. In addition, the agreement contained his acknowledgment that the Board had sufficient grounds to file a complaint against him²⁶; his acknowledgment that the settlement resolved his alleged violations of the specifically cited

²⁴ Findings of Fact, ¶¶ 4, 5, and 10.

²⁵ *Id.* at ¶ 8.

²⁶ *Id.* at ¶ 3.

authority, or the “charges” against him²⁷; and his agreement to pay an “administrative penalty” and the Nevada Board’s costs²⁸. Mr. Curtis had every reason to know the agreement was a disciplinary action.

We note that the Missouri Board offered and emphasized evidence that the Nevada Board always considers such settlements to be disciplinary.²⁹ We do not find evidence of how the Nevada Board views settlements to be probative, when the Missouri Board put on no evidence that any representative of the Nevada Board specifically told Mr. Curtis during negotiations that it (the Nevada Board) viewed the settlement as disciplinary. The lack of any evidence of the latter notwithstanding, the written agreement provides that the parties’ settlement terms are contained completely therein.³⁰ Therefore, we need not resort to parol or other extrinsic evidence of the parties’ agreement in any event.

The parties also spent time at hearing and in their written arguments disputing whether Mr. Curtis received and read the Nevada Board’s letter of October 21, 2011 before or after he performed his online renewal on December 12, 2011. The letter contains the Nevada Board’s representation that it considers the settlement to be disciplinary in nature. The timing of Mr. Curtis’ receipt of the letter is not pivotal. As noted, he negotiated with the Nevada Board himself and signed the agreement in October 2011, so he knew what it contained.

We additionally note that even if Mr. Curtis did not receive or read the letter until after he renewed his Missouri license on December 12, 2011, he specifically waived his right to statutory

²⁷ Findings of Fact, ¶¶ 4 and 7.

²⁸ *Id.* at ¶ 6.

²⁹ *Id.* at ¶¶ 14 and 15.

³⁰ Petitioner’s Exhibit 3, p. 4.

notice of the Nevada Board's actions.³¹ He should not now be heard to argue that his lack of notice shields him from reporting that he was the subject of a disciplinary action in Nevada.

Moreover, he had already signed the agreement and paid \$2,500 in administrative penalties and costs to the Nevada Board by the time he performed his online renewal in Missouri. Under the circumstances, we do not believe that Mr. Curtis—had he had any doubt—would have allowed almost two months to elapse without verifying that the Nevada Board had in fact formally taken up and accepted the agreement at its October 18, 2011 meeting, as the written agreement indicated the board planned to do.³² We instead find more plausible that Mr. Curtis assumed, if he did not already know, that the Nevada Board had in fact accepted the agreement on October 18, 2011.

We find cause for discipline exists under § 327.441.2(3), based on Mr. Curtis' misrepresentation.

Summary

Cause for discipline of Mr. Curtis's license exists under § 327.441.2(8) for disciplinary action taken against him in another state, and under § 327.441.2(3) because he made a misrepresentation.

SO ORDERED on October 21, 2013.

\s\ Alana M. Barragán-Scott
ALANA M. BARRAGÁN-SCOTT
Commissioner

³¹ Findings of Fact, ¶ 11.

³² *Id.*